FILED

(1)

95 1038 DEC 22 1995

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

LEMOND CONSTRUCTION COMPANY,

Petitioner,

v.

RICHARD WHEELER,
ADMINISTRATOR OF THE ESTATE OF
CHRISTOPHER GENE WHEELER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI

CHARLES E. SHARP*
JOEL A. WILLIAMS
Sadler, Sullivan, Sharp,
Fishburne & Van Tassel, P.C.
2500 SouthTrust Tower
420 North 20th Street
Birmingham, Alabama 35203-3204
(205) 326-4166

Attorneys for the Petitioner

*Counsel of Record

105 pp

QUESTION PRESENTED

Was the Petitioner's right to due process violated by the fact that the jury in a wrongful death case was permitted, in accordance with Alabama law, to impose a punitive damage award of $3.5 million against the Petitioner based on an act of simple negligence, without any apportionment of the award based on the degree of fault among the parties?

LIST OF PARTIES

The caption contains the names of all parties who appeared before the Supreme Court of Alabama.

LIST OF PARENT COMPANIES OR NONWHOLLY OWNED SUBSIDIARIES

There are no parent companies or nonwholly owned subsidiaries of Lemond Construction Company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
LIST OF PARENT COMPANIES OR NONWHOLLY OWNED SUBSIDIARIES . . .	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT . . .	9
CONCLUSION	27
APPENDIX	

TABLE OF AUTHORITIES

Cases	Page
Alabama Power Co. v. Turner, 575 So. 2d 551 (Ala. 1990), cert. denied, 500 U.S. 953 (1991)	12, 14
BMW of North America v. Gore, No. 94-896 (oral argument on Oct. 11, 1995)	17
Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988)	18
Bell v. Riley Bus Lines, 257 Ala. 120, 57 So. 2d 612 (1952)	13
Black Belt Wood Co. v. Sessions, 514 So. 2d 1249 (Ala. 1986)	12
Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989)	17, 18
Campbell v. Williams, 638 So. 2d 804 (Ala.), cert. denied, 115 S. Ct. 188 (1994)	11, 12, 13, 14
Central Alabama Electric Cooperative v. Tapley, 546 So. 2d 371 (Ala. 1989)	12, 14
City of Newport v. Fact Concerts, 453 U.S. 247 (1981)	20

TABLE OF AUTHORITIES (CONT'D)

Cases	Page
Colautti v. Franklin, 439 U.S. 379 (1979)	24
Day v. Woodworth, 54 U.S. (13 How.) 363 (1852)	22
Dennis v. United States, 341 U.S. 494 (1951)	23
Ex parte Smith, 412 So. 2d 1222 (Ala. 1982)	11
Fitzgerald v. State, 112 Ala. 34, 20 So. 966 (1895)	13
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	20
Heil Co. v. Crowley, 659 So. 2d 105 (Ala. 1995)	11
Henderson v. Alabama Power Co., 627 So. 2d 878 (Ala. 1993)	10
Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960)	24
Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994)	17, 18, 20, 21
International Board of Electrical Workers v. Foust, 442 U.S. 42 (1979)	20
Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112 (1927)	15, 16

TABLE OF AUTHORITIES (CONT'D)

Cases	Page
Magic Home Builders, Inc. v. Jolly, 539 So. 2d 303 (Ala. Civ. App. 1988)	11
Milwaukee & St. Paul Railroad v. Arms, 91 U.S. 489 (1876)	19
Missouri Pacific Railway v. Tucker, 230 U.S. 340 (1913)	26
Morrisette v. United States, 342 U.S. 246 (1952)	24
Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991) . . . . . 7, 16, 17, 21 passim	
Philadelphia, Wilmington & Baltimore Railroad v. Quigley, 62 U.S. (21 How.) 202 (1859)	19
Smith v. Schulte, Ms. 1930362, 1930459 (Ala. Aug. 18, 1995)	10
Smith v. Wade, 461 U.S. 30 (1983) 19, 20	
Southwestern Telegraph & Telephone Co. v. Danher, 238 U.S. 482 (1915)	25
St. Louis, Iron Mountain & Southern Railway v. Williams, 251 U.S. 63 (1919)	26

TABLE OF AUTHORITIES (CONT'D)

Cases — Page

Staples v. United States, 114 S. Ct. 1793 (1994) 24, 25

Tatum v. Schering Corp., 523 So. 2d 1042 (Ala. 1988) 10, 13, 14

TXO Production Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993) 17, 18, 21, 22

United States v. Dotterweich, 320 U.S. 277 (1943) 24

United States v. Freed, 401 U.S. 601 (1971) 24

United States v. Halper, 490 U.S. 435 (1989) 16, 19, 25

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 23, 24

Statutes

28 U.S.C. § 1257 1

Ala. Code Ann. § 6-5-391 . . 1, 2, 10, 11

Ala. Code Ann. § 6-5-410 . . 1, 3, 6, 10 passim

Ala. Code Ann. § 6-11-20 11

Ala. Code Ann. § 6-11-21 10

TABLE OF AUTHORITIES (CONT'D)

Cases	Page
Ala. Code Ann. § 13A-2-2	14
Ala. Code Ann. § 13A-5-7	14
Ala. Code Ann. § 13A-5-12	14
Ala. Code Ann. § 13A-6-3	13
Ala. Code Ann. § 13A-6-4	13, 14
Ala. R. App. P. 58	7
U.S. Const. amend. XIV	1

OPINIONS BELOW

The opinion of the Supreme Court of Alabama, issued on September 29, 1995, has not yet been reported. It is reproduced in the Appendix at 1. The trial court's order denying a new trial and denying a remittitur of damages is set out in the Appendix at 43.

JURISDICTION

The decision of the Supreme Court of Alabama was entered on September 29, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fourteenth amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]

The suit was brought by the administrator pursuant to Ala. Code Ann. § 6-5-410. The Alabama Supreme Court's opinion mistakenly referenced § 6-5-391. These two statutes are set out in their entirety in the Appendix at 65 and 66. The most pertinent provision of § 6-5-

410, governing actions in cases involving wrongful death, states:[1]

> [A] personal representative may commence an action and recover such damages as a jury may assess . . . for the wrongful act, omission or negligence of any person, persons, or corporation.

STATEMENT OF THE CASE

This case arises from the crash of an automobile driven by 15-year-old Jason Colley, in Lanett, Alabama, at 3:30 a.m. on Sunday, June 6, 1992. Jason, who had turned 15 just the day before and was not yet eligible for a driver's license (the minimum age being 16), was coaxed into taking his parents' car for a joyride in the middle of the night by his best friend, 13-year-old Christopher Wheeler. After a city police officer observed their car traveling the wrong way down a one-way street and attempted to stop the car, Christopher encouraged Jason to elude the police. At Christopher's urging, the boys then began to race through the city streets at speeds of up to 70 m.p.h., disregarding at least four stop signs and driving across a blind intersection of a major state highway without looking or even slowing down. Shortly after going airborne over a railroad crossing, the boys' car went out of control on Magnolia

---

[1] Ala. Code Ann. § 6-5-391 contains the identical language "such damages as the jury may assess" regarding actions brought by a parent.

Road. The car left the road and struck a tree, killing Christopher instantly.

For about six weeks prior to this time, Lemond Construction Company, a small family-owned contracting company run by Carlton Lemond, had been laying sewer lines for the City of Lanett under a HUD Community Block Development Grant. As part of this federally funded project, Lemond was required to dig trenches across certain city streets to install sewer pipe. The contract between the City and Lemond called for these trenches to be refilled with crushed stone until the end of the project, when the streets would be repaved. In the week before the death of Christopher, Lemond had been working on Magnolia Road and had dug trenches and refilled them in accordance with the contract.

In August 1992, under Ala. Code Ann. § 6-5-410, Christopher Wheeler's father, as administrator of his son's estate, filed a wrongful death action against both the City of Lanett and Lemond. The basis of the suit against the City was the claim that the City and its police officers had acted in a negligent or reckless and wanton manner in pursuing the car driven by Jason Colley, and had negligently or wantonly failed to maintain Magnolia Road in a safe condition. The allegation against Lemond was that it had negligently or wantonly failed to leave Magnolia Road in a safe condition at the end of the workday prior to the crash, and failed to place a warning sign. Lemond countered that the boys would have ignored such a sign just as they did the police blue lights, sirens, stop signs, and speed limits. Wheeler alleged that the acts of the City and Lemond combined to cause

Christopher's death. Lemond's Amended Answer raised constitutional defenses, including that the requested relief would be violative of the due process clause of the fourteenth amendment to the United States Constitution (App. at 55).

The City settled the case by paying Wheeler $75,000. Jason Colley's family paid Wheeler $25,000 in settlement. The case was tried solely against Lemond and the result was a $3.5 million verdict.

At trial, the trial judge summarily denied Lemond's constitutional arguments. Although acknowledging that it was "ludicrous" to allow the jury "to punish [Lemond] without benefits provided by the criminal corrections system," the judge indicated that he was bound by the precedent of the Supreme Court of Alabama (App. at 53). Wheeler argued that Lemond had breached the contract and hence its duty by not filling the top of the trench on Magnolia Road with temporary asphalt, rather than the crushed stone which was used. Lemond's evidence, including testimony from the City's street superintendent and the City's independent consulting engineer who actually wrote the contractual requirements, proved that the trenches were properly filled with crushed stone because both Lemond and the City agreed that their contract specified crushed stone. The City had always used crushed stone on such projects. The use of crushed stone was discussed and specified at the bid conference. Despite this agreement between the actual parties to the contract, Wheeler was permitted to use an as an "expert witness" a college professor from Tennessee to testify that the contract required the use of temporary

asphalt, based on an alleged inconsistency in the boilerplate language.

Numerous police officers and residents of Magnolia Road testified that the road surface was in a safe condition at the time of the accident. Wheeler countered with witnesses who stated that the trench was not filled to the surface of the street, and that there were depressions of up to several inches in the filled trenches. The official police report and photographs depicted no such deep trenches. While on the stand, the investigating officer produced for the first time a report depicting such matters. This undated report was not filed nor disclosed to the chief of police or Lemond. Wheeler's expert testified that the contract required Lemond to post warning signs at the site, which was not done. Lemond's evidence showed that the signs were not required after daytime working hours because the trenches were filled and the street was safe and re-open for normal driving at the 25 mph speed limit. Finally, Wheeler attempted to show wantonness on the part of Lemond by bringing in a laborer who had been fired by Lemond for poor performance. This witness stated that he had heard Lemond's foreman say prior to the accident that he was tired of hearing complaints about the road, and was "going to take the cheapest way out." Lemond was not permitted to impeach this witness with the fact that he was coincidentally released from jail the previous day after somehow coming up with a lump sum of money to pay back-due child support, and had been driven to court by an employee of the law firm representing Wheeler.

At the close of Wheeler's presentation of evidence, Lemond moved for a directed verdict on the basis of the fact that the accident was not caused by the condition of Magnolia Road, but was in fact caused by the boys' reckless and illegal actions in fleeing from police, speeding through stop signs, a railroad crossing, and a stoplight, and ignoring police sirens and the 25-mph-speed limit in a residential area. The motion was denied, as was a second motion for directed verdict made at the close of all of the evidence. The court directed a verdict against Lemond on its affirmative defense of contributory negligence, holding that Lemond failed to overcome the Alabama presumption that a 13-year-old is incapable of contributory negligence. The trial judge rejected Lemond's contention that Christopher engaged in adult activity and was thus barred by contributory negligence.

The case was submitted to the jury in accordance with Ala. Code Ann. § 6-5-410 and the case law construing it, which required punitive damages against Lemond for acts or omissions of simple negligence (App. at 60-64). Wheeler's lawyers asked for $7 million. The jury then returned a verdict of $3.5 million in punitive damages against Lemond. Subsequently, the trial judge denied motions for a judgment n.o.v., a new trial, or a remittitur of damages, raising, among other matters, that its constitutional right to due process was violated by the imposition of punitive damages for simple negligence, especially when such damages are not apportioned based on degree of fault (App. at 57). The trial court overruled Lemond's objections by denying the post-trial motion (App. at 43).

On appeal to the Supreme Court of Alabama, Lemond raised five issues concerning trial errors and further argued that a remittitur was required because the excessive punitive damage award was a serious miscarriage of justice. In addition, in Section VII of its brief, Lemond cited this Court's discussion in Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 18 (1991), regarding the need for fundamental fairness in the awarding of punitive damages, and contended that, given the circumstances of the case, Lemond's substantive and procedural due process rights were violated by the punitive damage award. The four pages[2] of Section VII of the Brief to the Supreme Court of Alabama are set out in the Appendix at 23. In Section VII, Lemond argued that the punitive damage award violated the fifth, eighth, and fourteenth amendments because the jury was not given adequate standards for the assessment of punitive damages, punitive damages were permitted for simple negligence, and there was no apportionment among joint tortfeasors, thus allowing imposition of punitive damages upon Lemond for actions of others.

The Supreme Court of Alabama upheld the judgment of the trial court in a divided opinion. Inexplicably, the majority of the court[3] declined to address

---

[2]Because of Rule 58 of the Alabama Rules of Appellate Procedure, regarding the length of briefs, space was limited for each issue raised before the court.

[3]Actually, the decision was made by only four of the nine justices on the court. Lemond filed a motion to recuse

the constitutional issue which had been raised in Section VII of the brief on appeal, stating simply that "Lemond's argument on this issue lacks the specificity required in order for this Court to address it" (App. at 17). In a separate opinion, Justice Maddox pointedly disagreed with this conclusion by stating that "I cannot find such a deficiency in the appellant's brief," and argued that the case was actually a perfect vehicle for addressing the important constitutional issues raised by Lemond. To demonstrate that the issues had in fact been properly raised, he took the extraordinary step of reprinting Section VII of Lemond's brief in its entirety in his opinion (App. at 23). Justice Houston's dissenting opinion focused on the trial judge's erroneous decision to bar a contributory negligence defense and to permit Wheeler's expert to testify that Lemond breached the contract.

Following the decision of the Supreme Court of Alabama, Wheeler refused to agree to a stay and the Supreme Court of Alabama refused to issue a stay pending the submission of a petition for a writ of certiorari. Lemond applied to this Court for a stay of execution of the judgment

---

Justice Kenneth Ingram, whose son Kenneth Ingram, Jr. was Wheeler's trial attorney, and former Chief Justice Sonny Hornsby, whose son Clay Hornsby is also a partner in the Alexander City, Alabama, law firm representing Wheeler. The motion was never ruled upon but when the court's opinion was issued, these two members, along with Justice Kennedy, did not participate.

and on November 6, 1995, the Court granted the application.

REASONS FOR GRANTING THE WRIT

What transpired in the Alabama courts in this case can be viewed only as a caricature of justice gone awry. Through the application of the unique Alabama wrongful death law, a jury has been permitted to impose an enormous multimillion-dollar punitive damage award against a public contractor on the basis of a finding of simple negligence, without the possibility of apportionment of the award between the other parties who were far more culpable in the events which led to the death at issue. The case thus epitomizes the unconstitutionality of permitting the imposition of unlimited punitive damages against merely negligent parties. The award in this case, and the statutory scheme which permitted it, so plainly violate due process and so clearly conflict with the recent precedents of this Court that the Court must grant the writ of certiorari. Also, this case presents the Court with the opportunity to clarify when, if ever, persons who have been merely negligent may have such severe and ruinous punishment assessed against them.

It must be recognized that the jury in this case was instructed on both wantonness and negligence, and that the trial court and Supreme Court of Alabama found that some evidence of wantonness had been introduced at trial. However, the jury was in fact permitted to base its punitive damages award on the basis of simple negligence. In a wrongful death

case in Alabama, there is no way to know if the jury has based its award calculation on simple negligence or wantonness, for it is not possible for the jury to specify the basis of its verdict.

I

Alabama is the only state in the union, and is apparently the only jurisdiction in the world, which permits the imposition of punitive damages against a tortfeasor for injuries caused by conduct which is found to be merely simple negligence.[4] Moreover, it does so in a system which places no cap on punitive damages,[5] and which does not permit the

---

[4]The laws and statutes of our fifty states were painstakingly researched to prove this point as outlined in four pages of footnotes in Tatum v. Schering Corp., 523 So. 2d 1042, 1052-1056 (Ala. 1988). As discussed in Tatum, the punitive damage requirement comes from an interpretation of the statute. The statutes, §§ 6-5-410 and 6-5-391, do not use the terms "punitive damages" or "punishment."

[5]A $250,000 cap on punitive damages imposed under Ala. Code Ann. § 6-11-21 was held unconstitutional in Henderson v. Alabama Power Co., 627 So. 2d 878 (Ala. 1993), as violative of the Alabama Constitution's provision guaranteeing the right to a jury. Legislation setting a cap on punitive damages in wrongful death cases involving health-care providers was recently declared unconstitutional in Smith v. Schulte, Ms. 1930362, 1930459 (Ala. Aug. 18, 1995).

apportionment of damages between a merely negligent tortfeasor and others who may have been considerably more culpable.

In other contexts Alabama adheres to the rule that punitive damages should be awarded only where the defendant acts with oppression, maliciousness, wantonness, or extreme recklessness, see, e.g., Heil Co. v. Crowley, 659 So. 2d 105 (Ala. 1995) (punitive damages for maliciousness in retaliatory firing of employee); Ex parte Smith, 412 So. 2d 1222 (Ala. 1982) (punitive damages for fraud of automobile dealer); Magic Home Builders, Inc. v. Jolly, 539 So. 2d 303 (Ala. Civ. App. 1988) (punitive damages for fraud of contractor). Alabama's wrongful death statutes, Ala. Code Ann. §§ 6-5-391 and 6-5-410, however, have repeatedly been construed to allow the assessment of punitive damages against any tortfeaser, even those guilty only of simple negligence, where death results.[6] See, e.g., Campbell v. Williams, 638 So. 2d 804 (Ala.), cert. denied, 115 S. Ct. 188

---

[6]This distinction was recently codified in a provision of the 1987 Tort Reform Act. Ala. Code Ann. § 6-11-20 states in part that "[p]unitive damages may not be awarded in any civil action, except civil actions for wrongful death pursuant to Sections 6-5-391 and 6-5-410, other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff." Moreover, the lesser "substantial evidence" standard applies in death cases rather than the "clear and convincing" standard.

(1994) (punitive damages awarded in medical malpractice against physician for simple negligence in treating patient); Alabama Power Co. v. Turner, 575 So. 2d 551 (Ala. 1990), cert. denied, 500 U.S. 953 (1991) (punitive damages awarded for simple negligence of power company); Central Alabama Electric Cooperative v. Tapley, 546 So. 2d 371 (Ala. 1989) (simple negligence of power company resulted in award of punitive damages). Moreover, juries in wrongful death cases are instructed that they must impose only punitive damages, and may not award compensatory damages. Campbell v. Williams, supra, 638 So. 2d at 809; Black Belt Wood Co. v. Sessions, 514 So. 2d 1249, 1262 (Ala. 1986).

Juries which are given the authority to assess these unlimited punishments do so with only the most rudimentary standards. In this case, for example, the jury heard no evidence and received no instructions concerning compensatory damages, which could have guided it in assessing punitive damages.[7] Rather, the jury was told only that the imposition of punitive damages was "entirely discretionary with the jury," and that in calculating an award it "must take into consideration the character and degree of the wrong as shown by the evidence in the case and the necessity of preventing similar wrongs" (App. at 62). The court

---

[7]In fact, under Alabama law, evidence concerning compensatory damages, such as a person's earning capacity, education, health, occupation, age, school performance, past earnings, future expected earnings, life expectancy, and other material matters, is not admissible.

also instructed the jury that "[p]unitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. The degree of reprehensibility of defendant's conduct should also be considered" (App. at 63). The lack of adequate standards in this case was borne out by the fact that the jury awarded $3.5 million, precisely one-half of the $7 million requested by Wheeler's lawyers--itself an arbitrary figure that was simply pulled from thin air.

In addition, the Alabama courts have long held that nothing in the wrongful death statute authorizes a jury to apportion damages among joint tortfeasors, and that the statute does not recognize degrees of culpability among joint tortfeasors. Campbell v. Williams, supra; Tatum v. Schering Corp., 523 So. 2d 1042, 1044-45 (Ala. 1988); Bell v. Riley Bus Lines, 257 Ala. 120, 57 So. 2d 612 (1952).

It is important to note that, while under the Alabama wrongful death statutes the jury was permitted to subject Lemond to unlimited punitive damages on the basis of simple negligence, and in fact imposed a $3.5 million judgment, Lemond could not be subject to any punishment under the criminal laws for simple negligence under either the common law or the Alabama Code. As in other states, Alabama has always required criminal negligence or recklessness in order to impose criminal liability in such cases, see Fitzgerald v. State, 112 Ala. 34, 20 So. 966 (1895) (common-law offense of manslaughter required "gross," wicked," or "criminal" negligence); Ala. Code Ann. § 13A-6-4 (criminally negligent homicide); Ala. Code

Ann. § 13A-6-3 (manslaughter), and defines criminal negligence as requiring "a gross deviation from the standard of care." Ala. Code Ann. § 13A-2-2(4). This is uniformly held to be a significantly higher degree of negligence than is required for tort liability. See Ala. Code Ann. § 13A-6-4 commentary. Moreover, the maximum penalty for committing the crime of criminally negligent homicide is a $2,000 fine, Ala. Code Ann. § 13A-5-12, and one year in a county jail. Ala. Code Ann. § 13A-5-7.

In recent cases upholding the constitutionality of the Alabama system for awarding damages in wrongful death cases, the Alabama courts have found that the Legislature's decision to allow unlimited punitive damages against a merely negligent tortfeasor is justified by the state's interest in the sanctity of human life, and by "society's desire to punish those whose conduct results in the loss of human life." Alabama Power Co. v. Turner, supra, 575 So. 2d at 554 (quoting Central Alabama Electric Cooperative v. Tapley, supra, 546 So. 2d at 376). The courts have noted that the predecessor to § 6-5-410 was enacted in 1852 and since 1860 has not been substantially modified by the Legislature, despite impassioned dissenting opinions urging it to do so. See Tatum v. Schering Corp., supra, 523 So. 2d at 1057; Campbell v. Williams, supra, 638 So. 2d at 808-12. In essence, the Supreme Court of Alabama has concluded that "[a]ny change in the interpretation of the statute should be left to the legislature." Campbell v. Williams, supra, 638 So. 2d at 812. Such an approach does not comport with due process. The courts must remedy a due process violation rather than waiting on

the possibility that a group of legislators will recognize a constitutional violation and take action to correct it.

Lemond would be remiss if it did not address the decision of Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112 (1927), a decision of this Court which upheld a $9,500 award against a department store whose employee negligently operated an elevator, resulting in the death of a customer. The Court in Louis Pizitz appeared to hold that there was no constitutional bar to the imposition of punitive damages for acts of simple negligence. However, a close examination of the precise ruling of the Court indicates that its decision focused not on the validity of the imposition of punitive damages for mere negligence, but rather addressed the issue of whether it was permissible to impose punitive damages on an employer for the actions of an employee, a result which was characterized as "a new form of vicarious liability." Id. at 115. The present case does not present any vicarious liability issues. In any event, in reaching its conclusion, the Court in Louis Pizitz stated:

> In defining the scope of the act, the state court has pointed out that the extent of the culpability and the amount of the verdict are for the jury and that its findings is not to be disturbed unless the verdict is 'induced or reached on account of prejudice, passion, or other improper motive or cause.' (citation omitted) The case was argued here on the assumption that its scope was

> thus limited and we so interpret the statute.

Id. at 114-15. Quite a bit has changed in 68 years. When Calvin Coolidge was President, no one could have dreamed of this scenario.

In Louis Pizitz, this Court quoted the Alabama law that the wrongful death statute was "remedial" and "not penal." This Alabama state court assumption squarely conflicts with this modern Court's view on what constitutes a penal statute. The Court has held in United States v. Halper, 490 U.S. 435, 448 (1989), that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment." For this reason, and for other reasons discussed below, the decision in Louis Pizitz plainly can no longer be seen as having any valid precedential value on this issue.[8]

---

[8]While Louis Pizitz Dry Goods Co. v. Yeldell, supra, 274 U.S. at 116, was cited in Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 14 (1991), the Court did so only with regard to the vicarious liability issue, and specifically did not condone the imposition of punitive damages for simple negligence, instead stating that "[i]mposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a position 'to guard substantially against the evil to be prevented'" (emphasis added).

II

This Court has repeatedly recognized in recent years that huge punitive damage awards raise significant constitutional issues. In the past few terms of the Court alone, concern over the constitutionality of certain punitive damage awards has led the Court to examine whether the excessive fines clause of the eighth amendment applies to punitive damages awards in civil cases between private parties, see Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989), whether the imposition of $840,000 in punitive damages against an insurance company for the willful and fraudulent theft by its agent was unconstitutional, see Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991), whether it was constitutional to award a $10 million punitive damage award on a judgment of $19,000 for actual damages in a fraud case, see TXO Production Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993), whether a state could constitutionally preclude judicial review of a jury's punitive damage award, see Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994), and whether a $2 million punitive damage award against an automobile manufacturer for intentional or reckless fraud, which was 500 times the compensatory damages awarded, was violative of the fourteenth amendment. See BMW of North America v. Gore, No. 94-896 (oral argument on Oct. 11, 1995).[9]

---

[9]In addition, as noted by the Court in Pacific Mutual Life Insurance Co. v. Haslip, supra, 499 U.S. at 9-12, in various cases individual Justices have

The Court has recognized that "[p]unitive damages pose an acute danger of arbitrary deprivation of property." Honda Motor Co. v. Oberg, supra, 114 S. Ct. at 2340. Yet the numerous opinions issued by the Justices two years ago in TXO Production, and the inability of any opinion to gain the support of a majority of the Court, demonstrate that the precise scope of the protection of the due process clause in punitive damages cases--and even the tests to be used to resolve constitutional issues in such cases--remains unsettled and requires further elucidation from the Court. Moreover, in the course of its recent examinations of the constitutionality of punitive damages awards, the Court has not as yet directly addressed the important issue presented in this case: whether it is violative of due process to impose punitive damages for acts of simple negligence, particularly where there is no cap on punitive damages, the jury is given insufficient standards for reaching its award, and there is no possibility for apportionment of the damages award among tortfeasors according to culpability.

---

expressed doubts about the constitutionality of certain punitive damages awards under the due process clause. See, e.g., Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., supra, 492 U.S. at 280-82 (Justice Brennan, concurring, joined by Justice Marshall); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 76-80 (1988) (Justice O'Connor, concurring in part and dissenting in part, joined by Justice Scalia).

There can be no doubt that the punitive damages awarded in this case were intended to be, and in fact were, a punishment. United States v. Halper, supra, 490 U.S. at 447 n.8 ("punitive damages, available in civil cases, serve punitive goals"). Permitting the imposition of such a punishment on the basis of mere negligence in the circumstances of this case simply cannot be squared with the principles of due process now recognized by this Court.

In a variety of contexts, this Court has recognized that punitive damages may be properly imposed only in order to punish persons who cause harm to others and who act with oppression, malice, willfulness, or wanton and reckless indifference to the consequences of their actions. In Smith v. Wade, 461 U.S. 30 (1983), for example, the Court thoroughly examined the history of punitive damages in American jurisprudence and found that, by the time of the adoption of the Civil Rights Act of 1871 (and also the fourteenth amendment), both state and federal courts consistently held that it was unjust to impose such damages in situations in which the defendant acted only with simple negligence. The Court noted that in Philadelphia, Wilmington & Baltimore Railroad v. Quigley, 62 U.S. (21 How.) 202, 214 (1859), a diversity libel suit, the Court held that it was erroneous to permit the jury to return a punitive damages award without adequate explanation that the defendant had to have inflicted injury maliciously or wantonly, and defined a malicious act as one undertaken with "criminal indifference to civil obligations." Subsequently, in Milwaukee & St. Paul Railroad v. Arms, 91 U.S. 489, 495 (1876), the Court held that to assess

punitive damages, "there must have been some wilful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences," and held erroneous an instruction which could have been misinterpreted to permit punitive damages for ordinary negligence. In fact, through modern times the Court has often indicated in various opinions that the imposition of punitive damages is not appropriate or justified where only simple negligence has been shown. See, e.g., Smith v. Wade, supra; City of Newport v. Fact Concerts, 453 U.S. 247, 266-67 (1981) ("Punitive damages by definition are . . . to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct"); International Board of Electrical Workers v. Foust, 442 U.S. 42, 61 (1979) ("No court . . . has ever held negligence can form the basis for a proper punitive damages award") (Justice Blackmun, concurring, joined by Chief Justice Burger and Justices Rehnquist and Stevens); Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-50 (1974) (punitive damages are prohibited in private defamation actions absent defendant's "knowledge of falsity or reckless disregard of the truth").

Alabama's unique deviation from this well-accepted common-law rule that punitive damages are permitted only to punish intentional, malicious, or wanton behavior, and to deter others from engaging in that type of behavior, raises a presumption that its practice violates the due process clause. See Honda Motor Co. v. Oberg, supra, 114 S. Ct. at 2339 ("As this Court has stated from its first Due Process cases, traditional practice provides a touchstone for constitutional

analysis"). Just as in Honda Motor, this case brings to the Court an issue concerning a state punitive damages practice which, while long established in the state, is completely at odds with the statutory and common-law rule in every other state.

The substantive and procedural protections offered by the due process clause in punitive damages cases are still being developed by the Court. Nevertheless, a number of principles have emerged which control the resolution of this case. First, at least a plurality of the Court has found that there is a substantive due process right that punitive damages be reasonable. Id. at 2335; see TXO Production Corp. v. Alliance Resources Corp., supra, 113 S. Ct. at 2726 (Justice Scalia, concurring). In addition, the Court has held that the due process clause mandates that the punishment imposed by a punitive damage award may only be meted out in accordance with adequate standards to guide the jury, and there must be both meaningful and adequate judicial review. Honda Motor Co. v. Oberg, supra, 114 S. Ct. 2341; Pacific Mutual Life Insurance Co. v. Haslip, supra, 499 U.S. at 22.

Underlying all of the recent decisions of the Court regarding punitive damages and due process is the common assumption or understanding that such damages are awarded only against persons or entities on the basis of a finding of intentional, malicious, or wanton behavior. Indeed, the opinions of the Justices can only be understood on the basis of that assumption. Thus, for example, while the Court in Pacific Mutual Life Insurance Co. v. Haslip, supra,

upheld the common-law method of assessing punitive damages, it did so only in the context of an action based on intentional fraud, and recognized in its opinion that punitive damages were justified under the common law against a defendant engaged in "'aggravated misconduct or lawless acts,'" on the basis of "'the enormity of his offence[.]'" 499 U.S. at 16 (quoting Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1852)). In fact, the very basis for the Court's holding in Pacific Mutual that the imposition of punitive damages by a jury in a civil case is not in and of itself unconstitutional was that a practice so well accepted at common law throughout every state and federal court could not be per se unconstitutional. 499 U.S. at 17. This principle has no application in the present case, obviously, for the historical record is completely different: there is no well-accepted body of common law supporting the imposition of unlimited punitive damages for simple negligence. Accordingly, the very basis of the holding in Pacific Mutual supports the conclusion in this case that the punitive damages award was unconstitutional. Indeed, this case does not involve common law at all. It concerns a statutory cause of action.

Similarly, in TXO Production Corp. v. Alliance Resources Corp., supra, the plurality opinion upheld a $10 million punitive damages award, but did so largely on its assessment of the extreme, fraudulent conduct of the defendants. The Court found that the award was not so extreme as to violate due process because the facts showed that "the petitioner set out on a malicious and fraudulent course" to harm the respondent, and that "the bad faith . . . scheme employed in this case was part of a larger pattern of fraud,

trickery, and deceit[.]" 113 S. Ct. at 2722. Justice Kennedy's concurring opinion specifically noted that "a case involving vicarious liability, negligence, or strict liability might present different issues." Id. at 2726 (Justice Kennedy, concurring) (emphasis added). This is that case.

In short, these recent cases have upheld punitive damage awards as reasonable and, thus, constitutional, in large part because of the finding that it is, and has long been held to be, appropriate to assess punishment--even heavy punishment--against persons who have harmed others through actions which were intentional, malicious, or wanton. Such a finding cannot be made in a case in which a jury has been permitted to impose an enormous punitive damages award for simple negligence. In fact, such an award conflicts with the Court's general views on when extreme punishment may be imposed.

The Court has long recognized in its decisions that the due process clause limits the extent of punishment imposed upon those who do not act intentionally or wantonly. For example, in the criminal context, "[t]he existence of a mens rea is the rule . . . rather than the exception[.]" Dennis v. United States, 341 U.S. 494, 500 (1951). The Court has held that punishment based on strict liability or simple negligence is prohibited except in extremely limited situations. For example, in United States v. United States Gypsum Co., 438 U.S. 422, 437 (1978) (citations omitted), the Court noted:

> "While strict liability offenses . . . do not invariably offend

> constitutional requirements, the limited circumstances in which Congress has created and this Court has recognized such offenses, attest to their generally disfavored status."

Thus, while the Court has upheld the imposition of punishment without evidence of criminal intent with respect to certain well-defined regulatory offenses, where strict liability was deemed essential to the protection of public health, see, e.g., United States v. Freed, 401 U.S. 601 (1971) (possession of unregistered hand grenades); United States v. Dotterweich, 320 U.S. 277 (1943) (distribution of adulterated drugs), it has done so in large part because the "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." Morrisette v. United States, 342 U.S. 246, 256 (1952). However, where statutes have sought to impose severe penalties for offenses based loosely on the common law, the Court has either insisted on a mens rea requirement, id. at 256 (larceny); United States v. United States Gypsum Co., supra (price fixing); Staples v. United States, 114 S. Ct. 1793 (1994) (possession of machine gun), or declared the statute unconstitutional in the absence of such a requirement. Colautti v. Franklin, 439 U.S. 379, 395 (1979) (homicide based on doctor's failure to use appropriate test for fetus viability; Court also relied on vagueness of prohibition). Justice Blackmun's opinion in Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960), succinctly summarized the Supreme Court's case law on this point:

> From these cases emerges the proposition that where a federal criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not one taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element is then not violative of the due process clause.

See also United States v. Halper, supra, 490 U.S. at 447 n.8 ("strict liability crimes are principally directed at social betterment rather than punishment of culpable individuals"); Staples v. United States, supra, 114 S. Ct. at 1802-04 (summarizing principles).

In addition, the Court has on at least one occasion set aside a civil penalty on due process grounds because it was a punishment imposed without a showing of intentional or reckless conduct. Southwestern Telegraph & Telephone Co. v. Danher, 238 U.S. 482 (1915). Focusing on the company's lack of mental intent to violate a known duty, the Court found that, in such circumstances, "to inflict upon the company penalties aggregating $6,300 was so plainly arbitrary and oppressive as to be nothing short of a

taking of its property without due process of law." Id. at 491. Other cases support the proposition that, in the absence of fraudulent or malicious behavior, the due process clause forbids civil punishments which are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." St. Louis, Iron Mountain & Southern Railway v. Williams, 251 U.S. 63, 66-67 (1919); see Missouri Pacific Railway v. Tucker, 230 U.S. 340, 351 (1913) (holding that a penalty violated due process because it was "grossly out of proportion to the possible actual damages").

III

This appeal rests on the accepted premise that punitive damages are not appropriate for simple negligence. It does not ask this Court to formulate guidelines where punitive damages have been imposed for intentional and malicious wrongdoing. This appeal seeks to eliminate the unique Alabama rule requiring punitive damages for simple negligence. Whereas it is demanding to agree on factors to govern punitive damages in oppressive fraud and intentional injury cases, it is not difficult to agree that simple negligence should not be punished with punitive damages.

CONCLUSION

For all of the foregoing reasons, the Petitioner, Lemond Construction Company, requests the Court to grant this Petition for a Writ of Certiorari to the Supreme Court of Alabama and accept this case for review.

Respectfully submitted,

CHARLES E. SHARP*
JOEL A. WILLIAMS
Sadler, Sullivan, Sharp,
Fishburne & Van Tassel, P.C.
2500 SouthTrust Tower
420 North 20th Street
Birmingham, Alabama 35203-3204
(205) 326-4166

Attorneys for the Petitioner

*Counsel of Record